In the

Supreme Court of the United States

October Term, 1953

No. 449

UNITED STATES OF AMERICA,
Petitioner

v.

MEADE GILMAN, JR.,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION OF FRED L. HARRISON FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF ON BEHALF OF FRED L. HARRISON

RICHARD W. GALIHER
636 Woodward Building
Washington, D. C.

RICHARD L. WILLIAMS
ROBERT G. BUTCHER
(Parrish, Butcher and Parrish)
1208 Mutual Building
Richmond 19, Virginia

Counsel for Harrison

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The undersigned, as attorney for and on behalf of Fred L. Harrison, respectfully moves this Honorable Court for leave to file the accompanying brief as *amicus curiae*.

Fred L. Harrison is the appellant in a case now pending before the United States Court of Appeals for the Fourth Circuit under the style of *Fred L. Harrison* v. *United States of America* (6725) argued January 13, 1954, at Charlotte,

North Carolina, in which the issue before the Court was identical to the issue before the Court in the instant case.

The Court of Appeals for the Fourth Circuit has notified counsel that its decision in Harrison's case will be reserved until the Court decides the instant case.

Because a decision by this Court will be determinative of Harrison's case we deemed it appropriate to make this application for leave to intervene herein as *amicus curiae* and submit the accompanying brief setting forth our views on the question involved in this case.

Counsel for the petitioner and counsel for the respondent have consented to the filing of this brief.

RICHARD W. GALIHER
636 Woodward Building
Washington, D. C.

February 24, 1954

RICHARD L. WILLIAMS
ROBERT G. BUTCHER
1208 Mutual Building
Richmond 19, Virginia

BRIEF ON BEHALF OF FRED L. HARRISON AS AMICUS CURIAE

OPINION BELOW

The opinion of the U. S. District Court for the Southern District of California (R. 26-29) is not reported. The opinions of the Court of Appeals (R. 52-58) are reported at 206 Fed. 2d 846.

JURISDICTION

The judgment of the Court of Appeals was entered on August 3, 1953. The petition for a writ of *certiorari* was filed on October 30, 1953, and was granted on December 14, 1953 (R. 61). The jurisdiction of this Court rests upon 28 U. S. C. 1254(i).

QUESTION PRESENTED

The single question raised by this appeal is whether the United States has a right to indemnity from an employee whose negligence imposes liability upon it by reason of the Federal Tort Claims Act.

STATUTES INVOLVED

The pertinent sections of the Federal Tort Claims Act, hereinafter referred to as the "Act", provide as follows:

> 28 U. S. C. 1346(b): "Subject to the provisions of Chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."
>
> 28 U. S. C. 2672: "The head of each federal agency, or his designee for the purpose, acting on behalf of the

United States, may consider, ascertain, adjust, determine, and settle any claim for money damages of $1,000 or less against the United States accruing on and after January 1, 1945, for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

"Subject to the provisions of this title relating to civil actions on tort claims against the United States, any such award or determination shall be final and conclusive on all officers of the government, except when procured by means of fraud.

"Any award made pursuant to this section, and any award, compromise, or settlement made by the Attorney General pursuant to Section 2677 of this title, shall be paid by the head of the federal agency concerned out of such agency's appropriations therefor, which appropriations are hereby authorized.

"The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter."

28 U. S. C. 2674: "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

"If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory

damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof."

28 U. S. C. 2676: "The judgment in an action under Section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim."

28 U. S. C. 2680: "The provisions of this chapter and Section 1346(b) of this title shall not apply to—

"(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

"(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

"(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

"(d) Any claim for which a remedy is provided by Sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

"(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of Sections 1-31 of Title 50, Appendix.

"(f) Any claim for damages caused by the im-

position or establishment of a quarantine by the United States.

"(g) Any claim arising from injury to vessels, or to the cargo, crew, or passengers of vessels, while passing through the locks of the Panama Canal or while in Canal Zone waters.

"(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

"(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

"(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

"(k) Any claim arising in a foreign country.

"(l) Any claim arising from the activities of the Tennessee Valley Authority.

"(m) Any claim arising from the activities of the Panama Railroad Company."

ARGUMENT

Inasmuch as the question before the Court involves a right which the petitioner is claiming by virtue of the Act we are taking the liberty to set forth certain background information which the Court may find helpful in determining the issue herein.

The Attorney General in 1941, prior to the passage of the Act, in an opinion to the Secretary of Agriculture, disclaimed any right of indemnity in favor of the United States. The full opinion appears in 40 Ops. Aty. Gen. p. 38 (1941), but we will set forth only the last three paragraphs

of the opinion which seem to express the general attitude taken by the Government on any right over it may have against an erring employee following payment for the employee's negligent acts:

"Numerous suits were filed by officers and employees of the Government and the judgments obtained were sometimes in amounts so large as to threaten financial ruin and bankruptcy. Notwithstanding the view stated by the Solicitor in *Dennis* v. *United States*, the Congress repeatedly came to the relief of the erring officers and employees. Thus, in *Murray* v. *Schooner Charming Betsy*, 2 Cranch 64, 124, the Supreme Court held Captain Murray of the U. S. Frigate Constitution personally liable for a tortious seizure, but the Congress made provision for his relief by the Act of January 31, 1805, see 12 Six Stst. 56. Some of these suits were undoubtedly prosecuted in anticipation of such action by the Congress. In other cases private acts appropriated money for the direct relief of the injured private persons.

"Since that time the Congress has by general legislation progressively assumed liability to persons sustaining injury through negligence of officers and employees of the Government and in doing so has not made provisions for the assertions of claims by the United States against the officers and employees causing the damage. A comprehensive review of the course of such legislation (including private acts) in collision cases appears in the Government's brief on reargument in *Boston Sand & Gravel Company* v. *United States* (No. 15, Oct. Term 1928), 278 U. S. 41.

"For the foregoing reasons it is my opinion that there is no authority in the Secretary of Agriculture to require an employee to reimburse the Government for a payment made in settlement of a claim under the Act of December 28, 1922. Of course, the employee

may be subject to suitable disciplinary action, including dismissal, if warranted."

The Act was passed by the Seventy-ninth Congress in 1946 as Title 4 of the Legislative Reorganization Act, 60 Statute 842. Prior to passage of the Act private bills were frequently introduced in Congress to appropriate funds to pay claims against the United States that arose as a result of tortious acts of employees of the United States and the following statistics taken from the foot notes in *Dalehite* v. *United States*, 346 U. S. 15, 73 Sup. Ct. 956, at pages 24 and 25, show the volume of these bills introduced in previous sessions of Congress:

"'In the Sixty-eighth Congress about 2,200 private claim bills were introduced, of which 250 became law. . . .

"'In the Seventieth Congress 2,268 private claim bills were introduced, asking more than $100,000,000. Of these, 336 were enacted, appropriating about $2,830,000, of which 144, in the amount of $562,000, were for tort.

"'In each of the Seventy-fourth and Seventy-fifth Congresses over 2,300 private claim bills were introduced, seeking more than $100,000,000. In the Seventy-sixth Congress approximately 2,000 bills were introduced, of which 315 were approved, for a total of $826,000.

"'In the Seventy-seventh Congress, of the 1,829 private claim bills introduced and referred to the Claims Committee, 593 were approved for a total of $1,000,253.30. In the Seventy-eighth Congress 1,644 bills were introduced; 549 of these were approved for a total of $1,355,767.12.' HR Rep. No. 1287, 79th Cong., 1st Sess., p. 2."

I.

The United States Did Not Have a Right to Indemnity From Its Employees Prior to Passage of the Act

While it is readily conceded that at common law a right to indemnity exists in favor of an employer who has been required to respond in damages under principles of *respondeat superior*, this right did not extend to the United States. Prior to passage of the Act, the United States had an absolute immunity from claims arising from tortious acts of its employees committed during the course and scope of their employment. The Court in *Prechtl* v. *United States*, 84 Fed. Supp. 889, in commenting on the United States' position prior to the Act said on p. 890:

> "The United States was not liable before enactment of the Tort Act and its very purpose was to assume liability of its employees when acting in their employment by the United States."

Notwithstanding its complete immunity from claims arising from tortious acts of employees prior to the Act, private bills were introduced in Congress to appropriate funds to pay judgments that had been obtained against Federal employees, or to pay claims before they were reduced to judgments. See *infra* page 8. When Congress appropriated money in these instances, its actions were gratuitous, and certainly no claim to indemnity could be made from an employee where the United States voluntarily waived its immunity and assumed an obligation that was personal solely to the employee.

Bearing in mind the fact that the United States had no right to indemnity from its employees prior to passage of the Act, does the Act itself create such a right? A careful

reading of the pertinent provisions of the Act set forth at the beginning of this brief shows conclusively that the Act is silent as to any rights the United States might have against its employees. Sections 1346(b) and 2674, *supra*, state only that the United States shall be liable to the claimant under circumstances where liability would attach if the United States were a private party. And Section 2676 expressly states that if the claimant obtains a judgment against the United States under the Act, it will be a complete bar to any action against the employee. Section 2672 also insulates the employee from liability where the claimant has been paid by administrative award. After reading the language of the Act itself, it takes very strained reasoning to conclude that the United States would give its employees complete protection under Sections 2672 and 2676 from the claimant, and then substitute itself to any and all rights that the claimant had against the employee.

II.

No Right of Indemnity from Employees Was Contemplated By Congress When the Act Was Passed

At this point some attention should be given to the legislative intent that gave rise to the Act. This Honorable Court in *Dalehite* v. *United States*, *supra*, recently considered in detail the various Congressional hearings and reports that took place before the Act was passed and stated the reasons for the Act being passed on page 24 as follows:

> "The Federal Tort Claims Act was passed by the Seventy-ninth Congress in 1946 as Title 4 of the Legislative Reorganization Act, 60 Stat. 842, after nearly thirty years of Congressional consideration. It was the offspring of a feeling that the Government should assume the obligation to pay damage for the mis-

> feasance of employees in carrying out its work. And the private bill device was notoriously clumsy. Some simplified recovery procedure for the mass of claims was imperative. This Act was Congress' solution, affording instead easy and simple access to the Federal Court for torts within its scope."

Certainly this Court could not logically conclude in the *Dalehite* case that the Act was the offspring of a feeling that the United States should assume the obligation to pay damage for the misfeasance of employees in carrying out its work, and now hold that the United States after assuming this obligation on behalf of its employees, could require an erring employee to make it whole for the obligation voluntarily assumed. If this Court should adopt the position now urged by the petitioner herein the Act will be turned into a burden insofar as Federal employees are concerned rather than a benefit. Before the Act was passed the employee could settle any claim that might be made against him, have a jury trial if he so desired, engage counsel of his own choice, know in some instances that suits would not be brought against him because his impecunious status was known, and in cases where an action was tried the award made by the court or jury might well be tempered because the defendant was an individual rather than a party whose ability to respond in damages was not open to question. Now that the Act has been passed all of these considerations are lost insofar as the employee is concerned, unless the claimant proceeds against him directly. And even though the employee is proceeded against directly by the claimant, if judgment is taken against him he can still apply to Congress for legislative relief. For example, Private Law 820, Eighty-second Congress, passed after the Act became effective, afforded such relief to a mail truck operator who had been

held liable to a claimant for negligence while acting within the course and scope of his employment by the United States.

Following this private bill, which was in effect another way of giving the employee the same protection he would have received if the claimant had sued the United States under the Act, could the United States then proceed against the employee for indemnity? Will the respondent in the instant case have a right to apply to Congress for a private bill to appropriate money to pay any judgment the court may enter against him in favor of the petitioner? If legislative relief is still granted to an employee where the claimant does not proceed against the United States under the Act, this same relief ought to be available to the employee if he becomes liable in damages by virtue of the Act. Certainly, the United States' policy toward its employees would be inconsistent if the same relief was not available to the employee, irrespective of how his personal liability arose. If the petitioner's claim is granted in this case, the entire purpose of the Act will be obviated, in that the employee has not been given the protection contemplated and Congress has not been spared the burden of private bills.

In *U. S.* v. *Yellow Cab Co.*, 340 U. S. 539, the Court, on page 350, made the following statement regarding an argument advanced by the United States that if followed, would give recourse to private bills before Congress:

> "However, if the Act is interpreted as now urged by the Government, it would mean that if an injured party recovered judgment against the Government, the Government then could sue its joint tortfeasor for the latter's contributory share of the damages (local substantive law permitting). On the other hand, if the injured party recovered judgment against the private tortfeasor it would mean that (despite local substantive

law favoring contributory liability) that individual could not sue the Government for the latter's contributory share of the same damages. Presumably the claimant would be relegated to a private bill for legislative relief. Such a result should not be read into this Act without a clearer statement of it than appears here."

Irving Gottlieb, Attorney, Tort Claim Section, Department of Justice, discussed the Government's right for indemnity under the Act in an article appearing in 9 Fed. Bar Journal 391, in the following language:

"It should be pointed out that in one of the early and well established fields where indemnity has been historically operative, that is, in the master-servant relationship, the Federal Tort Claims Act in its legislative history contemplates no action by the United States against its delinquent employees, other than disciplinary proceedings. Section 410(b) of the Act provides for a clear assumption of liability on the part of the United States for the delicts of its agents acting within the scope of their authority. Notwithstanding the foregoing, the Statute on its face being silent on the rights of the United States over against its employees and there being no prohibition of the common law right inherent in the master-servant relationship, the possibility of action over by the United States, where the situation is one calling for more than mere disciplinary action still remains."

Mr. Gottlieb reviews the legislative debates made prior to the passage of the Act when private bills were being passed to relieve the employee from liability and concludes that the debates contemplated no right to indemnity in favor of the United States. Mr. Gottlieb also found that these same debates and the reasoning therefor were adopted by Con-

gress when the Act was passed. That is, the Government was content to have the right to take appropriate disciplinary action against its employee and did not undertake to outline Government fiscal policies.

Moreover, meetings of the Inter-departmental Federal Tort Claims Committee were held on May 4, June 22, July 10, August 1, September 5 and 19, and November 26, 1951, at which time a Sub-committee expressly considered the question before the Court and concluded that no action should be taken to seek indemnification from employees who were responsible for imposing liability upon the United States under the Act. It is significant to note that the Committee had representatives present from sixteen major agencies of the Government, including four from the Department of Justice. It should also be borne in mind that these meetings took place almost five years after the Act was passed and occurred at about the same time the United States filed its first third party complaint against an employee seeking indemnity where it was sued under the Act. Certainly, the Department of Justice was derelict in not asserting claims for indemnity from the inception of the Act, if it believed that the Act created any such right. Perhaps a more plausible explanation for this delay in the right to indemnity being asserted is that it was an afterthought by the Department of Justice rather than any right that was intended to be created by Congress when the Act was passed. The history of the debates preceding the Act certainly supports this theory.

This Court in the *Dalehite* case considered many Congressional reports that covered discussions concerning passage of the Act when the bill was considered by Congress and makes it plain that Congress in passing the Act in 1946 relied upon the Congressional Committee Reports of 1942, including testimony before the committees that was incor-

porated into the reports. Assistant Attorney General Shea testified in detail before a Congressional Committee of the Seventy-seventh Congress, and in discussing Section 2672 of Title 28, which is the corresponding administrative equivalent of Section 2676, for cases that involve less than $1,000 and can be settled by administrative action, said:

> "It is just and desirable that the burden of redressing wrongs of this character be assumed by the Government alone, within limits, leaving the employee at fault to be dealt with under the usual disciplinary controls."

Assistant Attorney General Shea testified further in regards to this Section:

> "If the Government has satisfied a claim which is made on account of a collision between a truck carrying mail and a private car, that should, in our judgment, be the end of it. After the claimant has obtained satisfaction of his claim from the Government, either by a judgment or by an administrative award, he should not be able to turn around and sue the driver of the truck. The Chairman: Mr. Shea you are discussing and directing your remarks to the matter where, if a person is injured and files a claim against the Government and the Government satisfies that claim, that is the end of the claim against anybody? Mr. Shea: That is right. The Chairman: What is the arrangement when the Government has an employee who is guilty of gross negligence and injury results? Is there any requirement that that employee should in any way respond to the Government if it has to pay for the injury in the event of gross negligence? Mr. Shea: Not if he is a Government employee. Under those circumstances the remedy is to fire the employee. Mr. McLaughlin: No right of subrogation is set up? Mr. Shea: Not against the employee." (Hearings before the committee

on the Judiciary House of Representatives, 77th Congress, 2nd Session, on H. R. 5373 and 6463, pp. 9 and 10).

III.

The Federal Tort Claims Act Imposes Liability Upon Employees in Those Instances Where Congress Did Not Insulate the Employees from Liability.

A reading of the Act shows that employees are divided into two classes thereunder. Those guilty of simple negligence are relieved from all liability under Sections 1346(b), 2672, 2674 and 2676. However, those employees who are guilty of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights, fall into a separate class and are expressly denied the benefit of the Act by Section 2680(h). This Section unequivocally states that the United States will not be liable for its employees' tortious conduct under enumerated circumstances. If Congress had not intended to relieve employees from liability in all other instances, it would have so stated in the Act. It is difficult to understand why Congress would go to the trouble of enumerating instances in which a Federal employee would be responsible for his misconduct committed while acting on behalf of the United States if it intended for all employees regardless of any wrongful act they may have committed to fall in the same class. The only logical explanation for Section 2680(h) is that Congress planned to completely assume all liability insofar as Federal employees were concerned except in those instances where they were guilty of a wrongful act that approached being willful, namely those acts which were set forth in Section 2680(h).

IV.

Even if the United States Had a Right to Indemnity from Its Employees Prior to Passage of the Act Section 2676 Thereof Would Bar This Right.

Assuming for the purpose of argument that the United States had a right to indemnity prior to passage of the Act Section 2676 would bar this right.

In the instant case the Court of Appeals for the Ninth Circuit in reversing the District Court and entering final judgment in favor of the respondent said on page 848:

> "When we inquire whether a rule dependent upon this rationale should apply in the instant case, we are at once confronted by the circumstance that the moment judgment was entered against the Government, then by virtue of Section 2676, *supra*, the employee was no longer primarily answerable to the claimant,—he was not answerable at all. Therefore, when or if the Government paid the judgment against it, it was not paying a sum which the employee ought to have paid, for, as we have seen, any obligation on his part was completely wiped out.
>
> "It is therefore our conclusion that since any legal basis for a claim of indemnity is here lacking, the Government was not entitled to have judgment against the appellant. It is thus apparent that we do not deal with any question as to whether Section 2676 releases the Government's claim against its employee. Such is not the question here, but rather the inquiry is, whether, in the circumstances of this case any cause of action ever arose in favor of the Government and against its employee. Since the right of indemnity here asserted arises, in the case of employers generally, only by quasi-contract, through the payment of that which the employee himself, in equity and good conscience should have paid, it is manifest that here, where the employee owes no such duty, the circumstances of the necessary unjust enrichment do not exist, and no cause of action ever arose in favor of the Government.

"While the legislative history of the Tort Claims Act is in no sense controlling in an attempt to arrive at intended consequences of Section 2676, yet its indications are not at variance with the results here arrived at.

"We think it is clear from what was said in *United States* v. *Standard Oil Co.*, 332 U. S. 301, 305, 67 S. Ct. 1604, 91 L. Ed. 2067, that the question of the duty owed by a Government employee to the Government is one to be determined by federal and not by state law. The cause of action which the Government here sought to enforce was not one under the Federal Tort Claims Act which adopts local law for the purpose of defining the Government's tort liability. But regardless of whether state or federal law be here applied, Section 2676 cuts the ground from under the Government's claim for indemnity.

"It is to be noted that in using the language quoted *supra* from *United States* v. *Yellow Cab Co.* the Supreme Court was not dealing with a situation involving any possible application of Section 2676. The court was considering the question of contribution as between the United States and a stranger tortfeasor".

The petitioner is urging the Court to put it on the same basis as any other employer insofar as indemnity is concerned and stresses at length that Congress intended this result when the Act was passed. In support of its argument cases are cited wherein the United States has been given a right to contribution from a tortfeasor when sued under the Act and has been allowed indemnity from a third party tortfeasor. *United States* v. *Yellow Cab Company*, 340 U. S. 543; *United States* v. *Savage Truck Lines*, No. 6648-6651, decided December 21, 1953 (C. A. 4). The petitioner further claims that these were rights not specifically given by the Act and therefore its claim to indemnity is a matter for the courts to recognize and not something that should have been given when the Act was passed. This argument loses its force completely when attention is directed to the

intention of Congress when the Act was passed. This Court has held that one of the purposes of the Act was for the United States to assume its employees' liability for torts committed in carrying out governmental functions, *Dalehite* v. *United States*, *supra*. There, of course, was no intention on the part of Congress when it passed the Act to relieve persons that were strangers to the Federal system from liability, as a contrary holding in the *Yellow Cab* and *Savage Truck Lines* cases would have accomplished. In fact, strangers to the Federal system are benefitted to an extent by the Act since they can also claim contribution from the United States and indemnity in a proper case.

V.

In the Final Analysis the Question of Whether the United States Should Have Indemnity from Its Employees Under the Act Is One Involving Federal Fiscal Policy and Should Be Determined by Congress.

In *United States* v. *Standard Oil Co.*, 332 U. S. 201, the United States sought to recover from Standard Oil Company losses it had suffered as the result of injuries inflicted upon a soldier in an automobile accident with one of Standard Oil Company's trucks. It was undisputed that following the accident the United States had been required to provide medical care to its injured soldier as well as pay his salary during the time that he was confined to the hospital for treatment. The United States based its claim against Standard Oil Company upon numerous common law analogies such as a master's right to sue for loss of a servant's time, a father's right to sue for the loss of services of a minor child and various workmen's compensation statutes where the compensation insurance carrier or the employer become subrogated to any rights that the injured employee may have had against a third party to the extent

that they had been made to pay. The court in rejecting the Government's arguments and holding in favor of Standard Oil Company stated that whether or not the United States was entitled to recoup from a third party in such instances was a matter for the legislature in the following language:

> "Moreover, as the Government recognizes for one phase of the argument but ignores for the other, we have not here simply a question of creating a new liability in the nature of a tort. For grounded though the argument is in analogies drawn from that field, the issue comes down in final consequence to a question of Federal fiscal policy, coupled with considerations concerning the need for and the appropriateness of means to be used in executing the policy sought to be established. The tort law analogy is brought forth, indeed, not to secure a new step forward in expanding the recognized area for applying settled principles of that law as such, or for creating new ones. It is advanced rather as the instrument for determining and establishing the federal fiscal and regulatory policies which the Government's executive arm thinks should prevail in a situation not covered by traditionally established liabilities.
>
> "Whatever the merits of the policy, its conversion into law is a proper subject for Congressional action, not for any creative power of ours. Congress, not this court, or the other federal courts, is the custodian of the national purse. By the same token it is the primary and most often exclusive arbitor of federal fiscal affairs. And these comprehend, as we have said, securing the treasurer of the Government against financial losses however inflicted, including requiring reimbursement for the injuries creating them, as well as filling the treasury itself.
>
> "Moreover, Congress without doubt has been conscious throughout most of its history that the Government constantly sustains losses through the tortious or even criminal conduct of persons interfering with Federal funds, property and relationships. We cannot as-

sume that it has been ignorant that losses long have arisen from injuries inflicted on soldiers such as occurred here. The case therefore is not one in which as the Government argues, or that is involved is application of 'a well settled concept of legal liability to a new situation, where that new situation is in every respect similar to the old situation that originally gave rise to the concept.' "

In this connection it is interesting to note that under the Federal Workmen's Compensation Act, U. S. C. A., Title 5, Section 776, the United States is subrogated to any rights its employees may have against responsible third parties to the extent that it has been made to pay. It seems reasonable to assume that Congress in passing the Act would have made some provision to recoup the United States' losses following payment on behalf of an erring employee if it had not intended to assume the employee's liability and be solely responsible therefor. As the Court pointed out in the *Standard Oil Company* case, Congress has not been unmindful of these situations where Federal funds are being lost, but has purposely abstained from taking any action to recoup the loss.

While the petitioner attempts to distinguish its claim for indemnity in the instant case from the United States' claim against Standard Oil Company which was denied by this Court on the basis that Congress was not aware of any losses that the United States was suffering as a result of its employees' negligent acts, the statistics taken from the *Dalehite* case that appear on page 8 of our brief refute this contention. Moreover, the testimony of Mr. Shea, that we have set forth on page 15 of our brief shows that Congress through its committee was expressly advised that the United States would bear losses of this type alone, without any recourse being taken against its employees. After being so advised Congress did not deem it appropriate to incor-

porate a provision into the Act that would permit a recoupment of the United States' losses under the Act. If there has been a change of policy insofar as the petitioner's losses under the Act are concerned it is respectfully suggested that Congress would be the appropriate body to enact legislation that would permit the petitioner to recover these losses.

CONCLUSION

It is respectfully submitted that the petitioner is not entitled to indemity from its employees under the Act and that no such right was contemplated by Congress when the Act was passed. Moreover, if indemnity is granted to the petitioner herein the purposes of the Act will have been obviated in that the employee has not been protected as was contemplated, and Congress has not been spared from a flood of private bills seeking appropriations to pay claims against governmental employees. If the Court grants indemnity to the petitioner herein it will be transgressing into a matter that solely involves Federal fiscal policy and it is respectfully submitted that whether or not the United States recoups its losses in these cases is a matter that should receive the attention of Congress alone.

Respectfully submitted,

RICHARD W. GALIHER
636 Woodward Building
Washington, D. C.

RICHARD L. WILLIAMS
ROBERT G. BUTCHER
(Parrish, Butcher and Parrish)
1208 Mutual Building
Richmond 19, Virginia

Counsel for Harrison